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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JOHN ROETTGEN,

12 Plaintiff,

13 v.

14 D. PARAMO, ET AL.,

15 Defendant.
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Case No.: 3:16-cv-01806-LAB-BGS

**ORDER DENYING MOTION
REQUESTING COURT TO VACATE
ORDER**

19 **I. Procedural History**

20 Plaintiff, an inmate currently incarcerated at the California State Prison –
21 Sacramento located in Represa, California, initially filed this action on July 11, 2016. (ECF
22 No. 1.) On July 21, 2016, this Court granted Plaintiff’s Motion to Proceed *In Forma*
23 *Pauperis* (“IFP”) and dismissed his Complaint (“FAC”) pursuant to 28 U.S.C.
24 § 1915(e)(2). (ECF No. 3.) The Court found a number of deficiencies in his pleading but
25 nevertheless, Plaintiff was granted forty-five (45) days leave to file an amended complaint.
26 (*Id.* at 10-11.)

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1 On February 13, 2017, nearly seven months after the Court dismissed this action,
2 Plaintiff filed a “Motion for Copy of Court Order, Reinstate Case and for 45 days in which
3 to file First Amended Complaint.” (ECF No. 5.) The Court denied Plaintiff’s Motion to
4 reopen the case but granted him additional time to file an amended complaint. (ECF No.
5 5.) The Court also directed the Clerk of Court to mail a copy of the Court’s July 21, 2016
6 Order to Plaintiff. (*Id.*) Plaintiff then filed a second extension of time and claimed that
7 prison officials have confiscated his legal materials. (ECF No. 8.) The Court granted
8 Plaintiff’s request for additional time on August 1, 2017. (ECF No. 9.) However, Plaintiff
9 waited an additional year to bring his third request for an extension of time to file his First
10 Amended Complaint. (ECF No. 11.)

11 On September 13, 2018, based on Plaintiff’s allegations in his motion, the Court
12 found good cause to grant Plaintiff one final extension of time in which to comply with its
13 July 21, 2016 Order. (ECF No. 12.) Plaintiff was informed that if he failed to comply the
14 Court’s Order within this timeframe, the Court would enter a final order of dismissal.
15 Moreover, no further extensions of time would be granted absent a showing of exceptional
16 circumstances. (*Id.*)

17 After that timeframe passed yet again without a filing submitted by Plaintiff, the
18 Court DISMISSED the entire action for the reasons set forth in the Court’s July 21, 2016
19 Order and for his failure to prosecute pursuant to FED. R. CIV. P. 41(b) in compliance with
20 the Court’s September 13, 2018 Order. (ECF No. 13.) Judgment was entered on November
21 7, 2018. (ECF No. 14.)

22 On November 13, 2018, the Court received Plaintiff’s First Amended Complaint
23 (“FAC”). (ECF No. 15.) The Court rejected this filing on the grounds that the “Court
24 cannot entertain Roettgen’s motion or permit further amendments. (*Id.* citing *Lindauer v.*
25 *Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996).) On January 2, 2019, Plaintiff filed a “Motion
26 Requesting Court to Vacate Order Dismissing Case” pursuant to Fed. R. Civ. P. 60(b).

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II. Plaintiff's Motion pursuant to FED. R. CIV. P. 60(b)

A. Standard of Review

Under Rule 60, a motion for “relief from a final judgment, order or proceeding” may be filed within a “reasonable time,” but usually must be filed “no more than a year after the entry of the judgment or order or the date of the proceeding.” FED. R. CIV. P. 60(c)(1).

Rule 60(b) provides for reconsideration where one or more of the following is shown: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered before the court's decision; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has been satisfied; (6) any other reason justifying relief. FED. R. CIV. P. 60(b); *School Dist. 1J v. ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

“Although the application of Rule 60(b) is committed to the discretion of the district courts . . . , as a general matter, Rule 60(b) is remedial in nature and must be liberally applied.” *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 695-96 (9th Cir. 2001) (internal quotation marks and ellipsis omitted). Nevertheless, Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of “exceptional circumstances.” *Engleson v. Burlington N.R. Co.*, 972 F.2d 1038, 1044 (9th Cir. 1994).

B. Plaintiff's Motion

Despite Plaintiff's repeated failure to comply with Court deadlines, Plaintiff was granted one final extension of time on September 13, 2018. (*See* ECF No. 12.) Plaintiff claims that he had prepared his FAC for filing with the Court and “planned to make his copies of his FAC on October 22, 2018” at the prison's law library. (ECF No. 17 at 2-3.) However, he learned on October 22, 2018 that the library was closed and he was “unable to obtain his copies until November 6, 2018.” (*Id.* at 3.) Plaintiff “promptly mailed the FAC on the same day.” (*Id.*)

As stated above, the Court did receive this proposed FAC on November 13, 2018 but it was rejected as untimely on November 15, 2018. (*See* ECF No. 15 at 1.) Plaintiff

1 then waited until December 18, 2018¹ to prepare the Motion currently before the Court.
2 (See ECF No. 17 at 38.) Plaintiff filed his original Complaint two and a half years ago.
3 (See ECF No. 1.) The procedural history of this case shows quite clearly that Plaintiff has
4 engaged in unreasonable delay for the past two years. Plaintiff's only excuse for failing to
5 file his FAC in a timely matter is his assertion that the law library was closed on the day of
6 his choosing to make photocopies of his FAC. (See ECF No. 17 at 3.) Pursuant to the
7 Court's September 13, 2018 Order, Plaintiff's FAC was due to be filed with the Court on
8 October 28, 2018. (ECF No. 12 at 2.)

9 "What constitutes 'reasonable time' depends on the facts of each case, taking into
10 consideration the interest in finality, the reason for delay, the practical ability of the litigant
11 to learn earlier of the grounds relied upon, and prejudice to the other parties." *Lemoge v.*
12 *United States*, 587 F.3d 1188, 1196-97 (9th Cir. 2009) (quoting *Ashford v. Steuart*, 657
13 F.2d 1053, 1055 (9th Cir. 1981) (per curiam)).

14 Plaintiff acknowledges that this Court was "likely correct to reject Plaintiff's post-
15 dismissal motion for extension of time." (ECF No. 17 at 2.) Plaintiff never offers any
16 rational reason why he did not seek an extension of time when he knew that the law library
17 was closed. Instead, he waited for almost two months to file this Motion. The Court finds
18 that Plaintiff, throughout this action, has unreasonably delayed in complying with the
19 Court's Orders. Therefore, Plaintiff's Motion to Vacate the Court's November 7, 2018
20 Order is **DENIED**.

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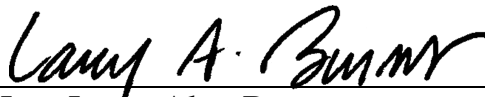
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26 ¹ Plaintiff dated his Motion on December 18, 2018. Accordingly, the Court finds that this Motion is
27 deemed "filed" on December 18, 2108. *Houston v. Lack*, 487 U.S. 266, 270-72 (1988) (notice of appeal
28 filed by a pro se prisoner is deemed to be "filed" when it is delivered to prison authorities for forwarding
to the district court); *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009) ("*Houston* mailbox rule
applies to § 1983 suits filed by pro se prisoners.").

1 **III. Conclusion and Order**

2 For reasons stated, Plaintiff's motion for relief from the Court's November 7, 2018
3 Order dismissing his case, and request to vacate the November 7, 2018 Order pursuant to
4 FED. R. CIV. P. 60(b) is **DENIED**.

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6 Dated: January 11, 2019



Hon. Larry Alan Burns
United States District Judge